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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 96-85

In re Applications of	)	WT Docket No. 96-41	
Liberty Cable Co., Inc.)		
)		
For Private Operational Fixed	)	File Nos.:	
Microwave Service Authorization and	)	708777	WNTT376
Modifications	)	708778, 713296	WNTM210
	)	708779	WNTM385
New York, New York	)	708780	WNTT555
	)	708781, 709426, 711937	WNTM212
	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	(NEW)
	)	717325	(NEW)
)		

**HEARING DESIGNATION ORDER
AND NOTICE OF OPPORTUNITY FOR HEARING**

Adopted: March 4, 1996

Released: March 5, 1996

By the Commission:

I. INTRODUCTION

1. This Order designates for hearing the above-captioned applications of Liberty Cable Co., Inc. ("Liberty") to construct and operate private operational fixed microwave service ("OFS") facilities in New York, New York.¹ We find that Liberty's admitted violations of the Communications Act and the Commission's Rules raise substantial and material questions of fact concerning its qualifications to be granted the above-referenced applications. In addition, we find that there are substantial and material questions concerning whether Liberty has engaged in misrepresentation before the Commission in connection with these applications.

¹ The Commission has granted Liberty special temporary authority to operate the microwave facilities conditioned on the resolution of the instant proceeding. See Letter to Howard J. Barr, Esq. from Chief, Microwave Branch, dated September 7, 1995.

II. BACKGROUND

2. Liberty is a multichannel video programming distributor (MVPD)² that uses facilities in the operational fixed microwave services pursuant to the Commission's action in Operational Fixed Microwave Service (Video Distribution System), 6 FCC Rcd 1270 (1991) ("the 18 GHz Order"), to deliver video programming services to approximately 30,000 subscribers in 150 buildings located in New York City. Liberty was awarded the first 18 GHz license to provide such service in 1991. Since that time, the Commission has granted Liberty 43 OFS licenses. Liberty has filed an additional 35 applications for new licenses; 15 of which are the subject of this Hearing Designation Order. We will instruct the Wireless Telecommunications Bureau to grant the others (and any future applications) conditioned upon the outcome of this proceeding (assuming they are otherwise grantable). All of the captioned applications to be the subject of the HDO involve instances of admitted violations of the Act and our rules.³ Previously, Liberty submitted Requests for Special Temporary Authority ("STA") to operate the facilities referenced in Liberty's applications. On September 7, 1995, the Commission granted Liberty's STA requests.

3. Time Warner Cable of New York City and Paragon Cable Manhattan both wholly owned by Time Warner Entertainment (collectively, "Time Warner") and Cablevision of New York City - Phase 1 ("Cablevision") have filed petitions to deny these applications.⁴ Time Warner has also opposed Liberty's STA requests.

4. Time Warner opposes Liberty's applications for the following reasons. First, Time Warner asserts that Liberty is "statutorily unqualified" to be a licensee because it is in violation of Section 621(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 541(b), and the Commission's cable television rules, 47 C.F.R. § 76 *et seq.*, through its provision of "unfranchised cable service" to 12 pairs of interconnected non-commonly owned, managed or controlled buildings. Second, Time Warner cites instances in which Liberty initiated OFS service prior to obtaining Commission authorization as further grounds for denying Liberty's applications. Finally, Time Warner charges Liberty with lacking candor before the Commission.

² See 47 U.S.C. § 522 (defining multichannel video distributor); see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, 9 FCC Rcd 7442, 7489 (1994).

³ Appendix A lists the applications for which Liberty commenced operation prior to receiving authority and Appendix B lists the applications relating to non-commonly owned buildings which Liberty has interconnected with wire.

⁴ Because the issues raised in various petitions filed by Time Warner and Cablevision are virtually identical, the petitioners will be referred to as "Time Warner" for ease of reference.

5. To support its position, Time Warner points out that Liberty admitted to a federal court that it had interconnected via hard wire 12 pairs of non-commonly owned buildings. Liberty Cable Company Inc. v. City of New York, 1995 U.S. Dist. Lexis 3158 (S.D.N.Y.); aff'd, 1995 U.S. App. Lexis 16956 (2nd Cir.). Section 621(b) of the Act prohibits a cable operator from providing cable service over a cable system without a franchise. During the relevant time period, the Communications Act excluded from the definition of a cable system "a facility that serves only subscribers in one or more multiple dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way." 47 U.S.C. § 602(7)(B). A facility that interconnects by wire separately owned or controlled buildings, whether or not it crosses public rights of way, did not qualify for this exclusion and was therefore included in the definition of a cable system. *See Communications Act*, § 602, 47 U.S.C. § 522(7)(B); Report and Order, 5 FCC Rcd 7638, aff'd sub nom., FCC v. Beach Communications, Inc., 113 S.Ct. 2096 (1993).

6. The New York State Commission on Cable Television ("NYSCCT") issued an Order to Show Cause why Liberty should not be subject to a franchise requirement, and, subsequently, a standstill order prospectively prohibiting Liberty from interconnecting by hard wire any new non-commonly owned, controlled or managed buildings while it remains unfranchised. The standstill order did not require Liberty to cease providing service to those buildings already interconnected.⁵ Liberty has applied for OFS authorizations which, if granted, would allow it to substitute microwave links for the hard wire interconnects. For its part, although Liberty admits to hardwiring the buildings, it asserts that, 47 U.S.C. § 522(7)(B), the common ownership requirement of the rules, imposes upon it an unconstitutional burden. Liberty sought a declaratory ruling to this effect from the New York Federal District Court.⁶

7. With regard to Time Warner's allegations of premature operation, Liberty has admitted that, prior to the grant of the STAs, it had been operating 19 microwave facilities without authorization. (Liberty Response to Commission Inquiry, August 14, 1995.) Liberty disclosed that the unauthorized paths provide video programming to 2,018 customers. However, Liberty has asserted that the unauthorized operations resulted from innocent actions and assumptions of Liberty employee Behrooz Nourain.

8. Time Warner bases its charge that Liberty has lacked candor on alleged inconsistencies in two sworn statements by Liberty's former Director of Engineering, Mr.

⁵ Liberty admits, however, that the NYSCCT is conducting a proceeding in which it is considering the timing and content of such an order. Liberty assures the Commission that should such an Order be issued, it will discontinue service to the 12 pairs of interconnected buildings. Reply to Opposition to Requests for STA, p. 7.

⁶ Although Liberty's request for declaratory ruling was denied, Congress recently revised Section 522(7)(B) to eliminate the common-ownership requirement. See Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (1996).

Behrooz Nourain.⁷ These declarations concern Mr. Nourain's knowledge of Time Warner's petitions to deny Liberty's OFS applications. As part of Liberty's explanation of the circumstances surrounding its initiation of unauthorized service, Mr. Nourain declared to the Commission that he was "unaware of the petitions against Liberty's applications until late April of 1995. Thus, without knowledge that his actions were in violation of the Commission's rules, and without intent to violate those rules, [he] commenced operation prior to grant." Surreply, May 17, 1995, p. 3. However, in an affidavit to the U.S. District Court for the Southern District of New York, dated February 23, 1995, Mr. Nourain stated, "I am advised that Time Warner has opposed Liberty's pending application to the Federal Communications Commission for various 18 Ghz microwave licenses." Response to Surreply, Attachment 2, p. 3. Liberty claims that the "placement of each of these statements in its proper context demonstrates that they are consistent." Reply, June 16, 1995, p. 3. Liberty explains that in the district court affidavit, Mr. Nourain focused exclusively on buildings Liberty served by hardwire interconnections. Mr. Nourain in that affidavit pointed out that one of the obstacles to converting these buildings to microwave was that Time Warner had filed petitions to deny Liberty's OFS applications. Liberty further explains that when Mr. Nourain submitted his May 17, 1995, statement to the Commission, he did not know until April, 1995, (as opposed to February 23, 1995) that Time Warner had opposed all of Liberty's OFS applications, including those proposing to provide service to the locations which Liberty was serving without authority.

III. DISCUSSION

9. Section 309(e) of the Communications Act requires the Commission to conduct an evidentiary hearing in the case of any applications in which substantial and material questions of fact exist. 47 U.S.C. § 309(e). As described below, the Commission has found that substantial and material questions of fact exist as to whether Liberty's OFS applications should be granted.

A. Liberty's Alleged Violations of the Cable Franchise Requirement

10. Under former Section 522(7)(B) of the Communications Act as amended by the 1984 Cable Act⁸, the interconnections between 12 pairs of non-commonly owned, managed or controlled buildings appeared to qualify Liberty as a "cable operator," even though the interconnections did not make use of any public right of way. See FCC v. Beach Communications, Inc., 113 S.Ct. 2096 (1993); 47 U.S.C. § 522(7). As such, Liberty was required to obtain a cable franchise, and comply with the Commission's cable television rules and would not have been able to avail itself of the "private cable system" exemption to the

⁷ As we understand the facts, Mr. Nourain is still employed by Liberty, however, he is no longer the Director of Engineering.

⁸ Cable Communications Policy Act of 1984, Public Law 98-549, 98 Stat. 2780, Oct. 30, 1984, which has been codified in the Communications Act at 47 U.S.C. §§ 521 *et seq.*

franchise requirement. See 47 U.S.C. § 541(b)(1). Liberty did not obtain a cable television franchise.

11. The Commission's 18 GHz Order specifically stated that the provision of video programming by OFS paths does not render the MVPD a cable operator. However, MVPDs "seeking to construct and operate 'cable systems' as defined by Section 522 [of the Act] must first obtain a franchise from the state government or its local designate." 6 FCC Rcd at 1272. Moreover, the Commission also stated (interpreting the definition in effect during the relevant time period) that if multiple unit dwellings are interconnected to each other by physically closed transmission paths, the systems are cable systems unless the buildings are under common ownership, control, or management and do not use public rights-of-way. Definition of a Cable Television System, 5 FCC Rcd 7638 (1990).

12. The Telecommunications Act of 1996 changes the definition of a cable system. The Bill eliminated Section 522(7)(B) which included "a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right-of-way" in the definition of a cable system. That subsection was replaced with Section 522(7)(B) "a facility that serves subscribers without using any public right-of-way." Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (1996). Because Liberty apparently does not use any public rights-of-way, the connections between non-commonly owned buildings would no longer classify Liberty as a cable operator. However, Liberty had such operations in effect prior to the enactment of legislation changing the definition. Therefore, a question still exists whether such unlawful operation has any bearing on Liberty's qualifications to be a Commission licensee.

13. Liberty's apparent violations of the Communications Act prohibition on operating a cable system without a franchise, along with its failure to disclose these apparent violations in the pending applications to the extent as required by Section 1.65 of the Rules, raise substantial and material questions concerning Liberty's qualifications to be a Commission licensee. Accordingly, we will designate appropriate issues in order to determine the facts and circumstances surrounding Liberty's hardwiring of interconnected, non-commonly owned buildings without first obtaining a cable franchise, and whether these apparent violations bear on its qualifications to be granted the above-referenced OFS licenses.

B. Liberty's Unauthorized OFS Operations

14. Section 301 of the Communications Act states that no person may operate a facility to transmit communications by radio without a license granted by the Commission pursuant to the Act.⁹ 47 U.S.C. § 301. As the Bureau has stated: "[t]he unlicensed operation

⁹ At the time Liberty filed the subject OFS microwave applications, the only way an
(continued...)

of a radio transmitter is one of the most serious violations under the Communications Act." Robert J. Hartman, 9 FCC Rcd 2057 (FOB 1994), citing Mebane Home Telephone Company, 51 RR 2d 926 (Com.Car.Bur. 1982). We confirm that unlicensed operation of a radio transmitter is a serious violation of the Act. See, e.g., Madison Communications, Inc., 8 FCC Rcd 1759 (1993); Data Investments, Inc., 6 FCC Rcd 4496 (1991) (unauthorized construction and operation are serious violations.). Furthermore, Section 94.23 of the Commission's Rules prohibits the operation of OFS service without a proper station authorization from the Commission.

15. Liberty admits that until the Commission granted Liberty's STA requests on September 7, 1995, it was operating 19 OFS facilities without Commission authorization. In six of these instances (which relate to three applications), Liberty was operating prior to applying for authority. These violations, along with Liberty's failure to disclose the violations in pending applications to the extent required by Section 1.65 of the Rules, raise substantial and material questions concerning Liberty's qualifications to be granted the above-referenced Commission licenses. Accordingly, appropriate issues will be designated.

C. Liberty's Truthfulness Before the Commission

16. The Commission must have full confidence in the truthfulness of representations made to it by Commission licensees. "The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest, each required to apply for [periodic] renewal[s]. . . . As a result, the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982). A breach of this duty is grounds for disqualification, even in non-broadcast services. Pass Word, Inc., 76 FCC 2d 465 (1980), aff'd per curiam Pass Word, Inc. v. FCC, 673 F.2d 1363 (D.C. Cir. 1982).

17. Generally, breach of the obligation to be truthful to the Commission takes two basic forms: (1) misrepresentation, and (2) lack of candor (failure to disclose). The former involves false statements of fact; the latter involves concealment, evasion, or other failures to be fully informative. Thus, a licensee's duty can be breached by affirmative misrepresentations and/or by a failure to come forward with a candid statement of relevant facts, whether or not such information is particularly elicited by the Commission. In re

⁹(...continued)

applicant could begin operations before the license was issued was pursuant to an STA. 47 C.F.R. §§ 94.23, 94.43. The Commission recently amended its rules so that applicants can now commence operation of OFS and other point-to-point microwave facilities upon the filing of an application with the Commission. See Report and Order, CC Docket 94-148 (released March 1, 1996).

Application of Fox Television Stations, Inc., 10 FCC Rcd 8452, 8491-92 (1995) (citations omitted). In order to commit misrepresentation or breach a duty of candor, the licensee must possess an intent to deceive at the time that it made a misrepresentation or must have failed to disclose material information to the Commission.

18. As explained above, whether Liberty's failure to reveal in its license applications and STA requests that it had interconnected buildings with hardwire and prematurely commenced operation may constitute a breach of Liberty's duty of candor. In addition, we believe that there are substantial and material questions of fact whether Mr. Nourain has intentionally misrepresented facts to the Commission.

19. In an attempt to explain the premature operation of service, Liberty alleged that its then director of engineering, Mr. Nourain, assumed the STAs would be granted within a matter of days of filing and thus rendered the paths operational. Mr. Nourain, according to Liberty and Mr. Nourain himself, was unaware of the petitions filed by Time Warner which delayed the grant of the STAs. Mr. Nourain's May 17 statement was intended to demonstrate to the Commission that Liberty's unauthorized operations were innocent and unknowing. Mr. Nourain stated that had he known of the petitions, he would have realized the grants would have been delayed and, Liberty would not have begun operation. Yet contrary to Liberty's and Mr. Nourain's statement before the Commission, Time Warner argues that Mr. Nourain filed an affidavit in federal court last February acknowledging that he knew that Time Warner had filed petitions to deny.

20. We do not believe that Liberty's attempt to reconcile Mr. Nourain's sworn declarations adequately responds to Time Warner's allegation that Liberty has lacked candor before the Commission. Specifically, we find it difficult to reconcile Mr. Nourain's February 23, 1995, district court affidavit, in which he acknowledges that he was aware of Time Warner's petitions to deny, with his May 17 statement to the Commission that, until April, 1995, he was unaware of Time Warner's petitions to deny. Accordingly, we find that an inconsistency appears to exist. Because the statement that Mr. Nourain was unaware of any petitions was used as an attempt to excuse unauthorized service, Mr. Nourain and Liberty could potentially benefit if that statement is not true. Liberty, based on Nourain's sworn statement to the Commission, states that "without knowledge that his actions were in violation of the Commission's Rules, and without intent to violate those rules, Mr. Nourain commenced operation prior to grant." A prior statement acknowledging petitions to deny was made to a tribunal other than the Commission and was not filed with the Commission. Without Time Warner bringing it to our attention, we would not have known of its existence. Therefore, there is reason to believe that any misstatements by Mr. Nourain may have been intentional. Thus, we find that a substantial and material question exists as to whether Liberty has engaged in misrepresentation to the Commission in connection with these applications and we designate appropriate issues.

IV. INTERIM OPERATING AUTHORITY

21. Liberty has commenced service to the public through the grant of the STAs. The STAs expire on March 4, 1996. Therefore, to preserve the continuity of service, we will grant Liberty interim operating authority under Section 4(i) of the Act to continue operations until a final resolution is made on the issues designated herein. *See, e.g., La Star Cellular Telephone Co.*, 4 FCC Rcd 3777 (1989), *aff'd sub nom., La Star Cellular Telephone Co. v. FCC*, 899 F.2d 1233 (D.C. Cir. 1990) (court affirms Commission grant of interim operation to ensure uninterrupted service). We believe that the authorization of interim operating authority is appropriate and will serve the public interest for several reasons. First, although we find there are substantial and material questions of fact regarding Liberty's qualifications to be granted the above-captioned Commission licenses, no determination has yet been made finding Liberty unfit.

22. Second, allowing Liberty to continue to operate will promote competition, therefore encouraging and fostering the development of high quality, innovative services, at reasonable rates, to the consumer.¹⁰ As we recognized in the 1994 Competition Report, the promotion of competitive entry of alternative technologies, such as OFS service, is a critical element of the regulatory framework mandated by Congress.¹¹ In addition, the legislative history of the 1984 Cable Act stresses the need for policies that encourage the development of video services competition.¹² Moreover, the U.S. Court of Appeals has recognized the importance of allowing interim operation to ensure cellular radio competition in *La Star*, where it stated: "the loss of a single wireline service, even on an interim basis, would remit the public to dependence upon a monopoly non-wireline provider." *La Star*, 899 F.2d at 1235. The instant situation is analogous -- the loss of the service provided by Liberty would remit its subscribers to dependence upon a monopoly provider, the cable system operated by Time Warner.

23. Third, there are no competing applicants whose rights are implicated by the grant of interim operating authority.

24. Fourth, the interim authority granted to Liberty will not prejudice Time Warner's challenge to Liberty's applications. The trier of fact in this proceeding is charged with

¹⁰ *See, e.g., Report and Order* in MM Docket 82-434, 7 FCC Rcd 6156 (1992); *Second Report and Order* in Gen Docket No. 90-54, 6 FCC Rcd 6792 (1992); *Order on Reconsideration* in Gen. Docket No. 90-54, 6 FCC Rcd 6764 (1992). *Further Notice of Proposed Rule Making, First Report and Order, and Second Further Notice of Inquiry* in CC Docket No. 87-266, 7 FCC Rcd 300 (1991).

¹¹ *1994 Competition Report*, 9 FCC Rcd 7447 (1994).

¹² *See* S. Rep. No. 92, 102d Cong., 2d Sess. 1, 18, *reprinted in* 1992 U.S. Code Cong. & Admin. News 1133, 1133, 1151; H.R. Rep. No. 628, 102d Cong., 2d Sess. 27, 30, 44 (1992).

determining whether Liberty is qualified to be granted the captioned licenses. The fact that Liberty is currently serving customers by STAs will not affect the determination of the issues.

25. Finally, denying interim operating authority would result in a loss of service to some of the customers Liberty is currently serving with the facilities operating under the STAs. Accordingly, we find it is in the public interest to promote competition by allowing Liberty to continue to provide service until the questions concerning its qualifications can be resolved.¹³ The Commission has been advised that the majority of Liberty's subscribers may also be served by the franchised cable operator. However, because the Commission cannot be assured that all of Liberty's subscribers have access to service provided by Time Warner, the Commission has determined to grant Liberty interim operating authority pending the outcome of this hearing.

26. Although the Commission has previously authorized joint service, we do not believe that joint interim operation is a sound alternative. Liberty delivers video services to subscribers through OFS facilities. The service provided by Liberty originates at a headend and is transmitted by OFS frequencies to receivers on buildings in New York. Because Liberty's provision of service reaches far beyond the applications at issue here, joint operation is not feasible. There is no practical way to separate Liberty's provision of service to subscribers covered by the STAs and its provision of service to its other customers.

IV. CONCLUSION AND ORDERING CLAUSES

27. In light of the circumstances, the public interest demands that this proceeding be conducted henceforth with dispatch. We therefore direct that the presiding administrative law judge expedite these proceedings to the greatest extent possible consistent with due process. Moreover, as we did in WWOR-TV, Inc., 6 FCC Rcd 1524, 1525 (1991), we will rule directly on any exceptions to the initial decision.¹⁴

28. We have examined the allegations against Liberty in light of the standards for designating a hearing issue. See Astroline Communications Limited Partnership v. FCC, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988); 47 U.S.C. §§ 309(d), 309(e). When we examine the record, we find that there are substantial and material questions of fact as to whether the public interest would be served by granting Liberty the specified OFS licenses. Specifically, substantial and material questions of fact concerning Liberty's qualifications to be granted the

¹³ See also Otis L. Hale, FCC 86-290 (released June 16, 1986) (In order to preserve existing service, Commission granted interim operating authority to Hale until a permanent licensee could be granted, despite a finding by the ALJ that Hale had engaged in a long course of deception and total disregard of the Commission's Rules.).

¹⁴ The Commission has eliminated the Review Board effective March 29, 1996. See Order, Fcc 96-4 (released January 16, 1996). However, that action is subject to approval of the relevant congressional committees, which has not yet been obtained.

above-referenced licenses arise as a result of Liberty's apparent willful and repeated violations of the Commission's Rules and the Communications Act of 1934, as amended. In addition, substantial and material questions of fact exist concerning Liberty's truthfulness before the Commission in connection with these applications. Because the violations that are the subject of this Order arose in connection with the specific applications referenced above, we will limit the hearing to those applications. We will instruct the Bureau to grant other pending (and future) applications of Liberty (assuming they are otherwise grantable) conditioned on the outcome of the hearing. This will preserve, to the extent necessary, the ability of the Commission to revisit such grants if the outcome of the hearing warrants.

29. Moreover, we believe the presiding administrative law judge should be given authority to impose forfeitures against Liberty should any be appropriate. Therefore, if it is determined that Liberty violated the Communications Act by operating a cable system without a franchise, commenced an unauthorized service, or misrepresented facts or lacked candor before the Commission, the trier of fact is authorized to impose a forfeiture up to the statutory maximum.

30. Accordingly, IT IS ORDERED that pursuant to Section 309 of the Communications Act of 1934, 47 U.S.C. § 309, the captioned application is DESIGNATED FOR HEARING on the following issues:

- (1)
 - (a) To determine the facts and circumstances surrounding Liberty Cable Co., Inc.'s operation of hardwired interconnected, non-commonly owned buildings, without first obtaining a franchise. See 47 U.S.C. § 541(b)(1), 47 U.S.C. Title VI and 47 C.F.R. § 76 *et seq.*
 - (b) To determine whether Liberty Cable Co., Inc. has violated Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65, by failing to notify the Commission of its provision of service to interconnected, non-commonly owned buildings.
 - (c) To determine whether, based on (1)(a) and (b) above, Liberty is qualified to be granted the above-captioned private operational fixed microwave authorizations.
- (2)
 - (a) To determine the facts and circumstances surrounding Liberty Cable Co., Inc.'s admitted violations of Section 301 of the Communications Act and Section 94.23 of the Commission's Rules, 47 U.S.C. § 301, 47 C.F.R. § 94.23, by operating certain private operational fixed microwave facilities without first obtaining Commission authorization.
 - (b) To determine whether Liberty Cable Co., Inc. has violated Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65, by failing to notify the Commission of its premature operation of service in either its underlying applications or its requests for special temporary authority.

- (c) To determine whether, based on (2)(a) and (b) above, Liberty is qualified to be granted the above-captioned private operational fixed microwave authorizations.
- (3) (a) To determine whether Liberty Cable Co., Inc., in relation to its interconnection of non-commonly owned buildings and its premature operation of facilities, misrepresented facts to the Commission, lacked candor in its dealings with the Commission, or attempted to mislead the Commission, and in this regard, whether Liberty Cable Co., Inc. has violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17.
- (b) To determine whether, based on (3)(a), above, Liberty is qualified to be granted the above-captioned private operational fixed microwave authorizations.
- (4) To determine, based on the evidence adduced in issues (1) through (3) above, whether Liberty Cable Co., Inc. possesses the requisite character qualifications to be granted the above-captioned private operational fixed microwave authorizations for which it has applied and, accordingly, whether grant of its applications would serve the public interest, convenience and necessity.

32. IT IS FURTHER ORDERED that the hearing shall be held at a time and place and before an Administrative Law Judge to be specified in a subsequent Order.

33. IT IS FURTHER ORDERED that Time Warner Cable of New York City and Paragon Cable Manhattan, Cablevision of New York City - Phase I, and the Wireless Telecommunications Bureau are made parties to this proceeding. The applicant and parties may avail themselves of an opportunity to be heard by filing written notices of appearance under Section 1.221 of the Commission's Rules, 47 C.F.R. § 1.221, within 20 days of the mailing of this Order by the Secretary of the Commission. The notice and other expedited procedures of Section 1.822(b) of the Commission's Rules, 47 C.F.R. § 1.822(b), shall not apply in this case.

34. IT IS FURTHER ORDERED, pursuant to Section 309(e) of the Communications Act of 1934, 47 U.S.C. § 309(e), that the burden of proceeding with the introduction of evidence and the burden of proof shall be on Liberty Cable Co., Inc.

35. IT IS FURTHER ORDERED that it shall be determined, pursuant to Section 503(b)(3) of the Communications Act of 1934, 47 U.S.C. § 503(b)(3), and Section 1.80(g) of the Commission's Rules, 47 C.F.R. § 1.80(g), whether an ORDER OF FORFEITURE shall be issued against Liberty Cable Co., Inc., in an amount not exceeding the statutory maximum for violations of Section 301 of the Communications Act, 47 U.S.C. § 301, and Sections 1.17, 1.65, and 94.23 of the Commission's Rules, 47 C.F.R. §§ 1.17, 1.65, 94.23.

36. IT IS FURTHER ORDERED that, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the

Communications Act of 1934, 47 U.S.C. § 503(b)(3). The Commission has determined that, in every case designated for hearing involving denial of an application for alleged violations which also come within the purview of Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Accordingly, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

37. IT IS FURTHER ORDERED that the Petitions to Deny or Condition Grant filed by Time Warner Cable of New York City and Paragon Cable Manhattan and by Cablevision of New York - Phase 1 are GRANTED to the extent indicated herein and DENIED in all other respects.

38. IT IS FURTHER ORDERED that Liberty Cable Co. is GRANTED interim operating authority to operate the locations that are the subject of the 15 grants of Special Temporary Authority issued by the Wireless Telecommunications Bureau which relate to the captioned applications.

39. IT IS FURTHER ORDERED that the Wireless Telecommunications Bureau grant the remaining pending applications filed by Liberty Cable Co., Inc. (if otherwise grantable) and condition those (and future) grants on the outcome of this proceeding.

40. IT IS FURTHER ORDERED that exceptions, if any, of the presiding administrative law judge's initial decision SHALL BE SUBMITTED TO THE COMMISSION rather than to the Review Board.

41. The Secretary shall cause a summary of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Nineteen (19) Instances of Unauthorized OFS Operations

FCC File Number	FCC Call Sign	Receiver Location (New York City)	Date License Applied For	Date STA Applied For	Date Liberty Began Service
708778	WNTM210	35 W. End Ave.	12/22/94	5/4/95	1/3/95
	WNTM210	639 W. End Ave.	12/22/94	5/4/95	2/14/95
708779	WNTM388	441 E. 92nd St./ 1775 York Ave.	2/21/95	5/4/95	1/16 or 1/23/95*
	WNTM555	767 Fifth Ave.	11/7/94	5/4/95	4/12 or 4/17/95
	WNTM385	1295 Madison Ave.	7/17/95	7/24/95	7/27 or 7/28/94*
708780	WNTM555	38 E. 85th St.	7/17/95	7/24/95	7/18/94*
	WNTM555	564 First Ave.	11/7/94	5/4/95	1/3 or 1/11/95
	WNTM555	545 First Ave.	11/7/94	5/4/95	1/3 or 1/23/95
	WNTM555	200 E. 32nd St.	3/23/95	5/4/95	3/27/95
708781	WNTM385	30 Waterside Plaza	2/21/95	5/4/95	3/15/95
	WNTM212	430/440 E. 56th St.	7/17/95	7/24/95	7/11/94*
	WNTM212	433 E. 56th St.	1/31/95	5/4/95	12/27/94*
	WNTM212	114 E. 72nd St.	11/23/94	5/4/95	1/30/95
	WNTM212	524 E. 72nd St.	11/7/94	5/4/95	11/16/94
709332	WNTY371	25 W. 54th St.	11/23/94	5/4/95	2/6/95
709426	Consolidated with 708781				
711937	Consolidated with 708781				
712203	WNTW782	380 Rector Pl.	7/17/95	7/24/95	10/12/94*
712218	WNTY584	16 W. 16th St.	2/21/95	5/4/95	3/28/95
712219	WNTY605	6 E. 44th St.	2/21/95	5/4/95	4/12 or 4/19/95
713295	WNTX889	2727 Palisades Ave.	3/24/95	5/19/95	4/24/95
713296	Consolidated with 708778				

* Liberty activated service on these paths prior to applying for the license.

APPENDIX B

Thirteen (13) Instances of Unauthorized "Hardwire" Interconnections

FCC File Number	FCC Call Sign	Hardwired Location (New York City)	Receiver Location (New York City)	Date Liberty Began Service
708777	WNTT370	220 E. 52nd St.	211 E. 51st St.	6/13/94
708778	WNTM210	55 Central Park W.	10 W. 66th St.	9/21/94
	WNTM210	170 W. End Ave.	160 W. End Ave.	5/26/94
	WNTM210	152 W. 57th St.	118 W. 57th St.	1/31/94
708779	WNTM385	120 E. End Ave.	510 E. 86th St.	7/18/94
	WNTM385	525 E. 86th St.	535 E. 86th St.	5/5/94
	WNTM385	44 W. 96th St.	12 W. 96th St.	12/15/93
708781	WNTM212	60 Sutton Pl.	420 E. 54th St.	11/23/92
	WNTM212	425 E. 58th St.	400 E. 59th St.	5/25/94
	WNTM212	239 E. 79th St.	229 E. 79th St.	3/28/94
	WNTM212	225 E. 74th St.	207 E. 74th St.	2/6/95
709426	Consolidated with 708781			
711937	Consolidated with 708781			
713296	Consolidated with 708778			
713300	New	Lincoln Harbor Yacht Club	600 Harbor Blvd.	4/13/95
717325	WPJA278	164 E. 87th St.	170 E. 87th St.	10/21/93